United States Department of the Interior

BUREAU OF LAND MANAGEMENT

TAKE PRIDE IN AMERICA

5/019/030

IN REPLY REFER TO

Moab District
Grand Resource Area
885 South Sand Flats Road
Moab, Utah 84532

RECEIVED
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DIV. OF OIL, GAS & MINING

UTAH STATE OFFICE
STATE DIRECTOR OFFICE

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The Honorable William H. Orton
United States House of Representatives
Congress of the United States
51 South University Avenue
Provo, Utah 84601

Dear Representative Orton:

We are in receipt of your September 22, 1994, letter of inquiry regarding the mining claim activities of Mr. Ronald Pene in the Westwater Canyon Wilderness Study Area (WSA, UT-060-118). We appreciate the opportunity to address your concerns and provide information relative to the issues brought to your attention by Mr. Pene.

We believe most of Mr. Pene's concerns revolve around confusion and/or disagreement relating to the statutory authorities of the Bureau, granted under the Federal Land Policy and Management Act of 1976 (FLPMA, 43 U.S.C.A. 1701), and the Mining Law of 1872 (30 U.S.C.A. 21, et. seq.). Therefore, in addition to answering your inquiry, we hope our response will also help Mr. Pene better understand the statutory and regulatory responsibilities and requirements of operations on mining claims within Bureau of Land Management WSA's. Our response will address your concerns in the order in which they appear in your inquiry.

Alleged Harassment

Your inquiry indicates that Mr. Pene feels he has been subject to harassment by the Bureau. We regret that Mr. Pene feels this way, as there has never been any attempt on the part of the Bureau or any of it's employees to harass Mr. Pene. Because of Mr. Pene's position on the applicability of FLPMA as it relates to operations conducted under the 1872 Mining Law, we have had disagreement with Mr. Pene in the past over authorization of activity on his mining claims within the WSA.

As you are aware, Section 603(a) of FLPMA specifically directed the Bureau to carry out a wilderness review of public lands. Section 603(c) mandated that "During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness."

These mandates in FLPMA establish as a matter of law that, while some development activities are permissible on lands under wilderness review, they are subject to limitations and must be carefully regulated. Regulations found at 43 CFR 3802 were subsequently established to implement this mandate relative to actions taken in WSA's under authority of the 1872 Mining Law.

Specific Bureau guidelines and policy for management of these lands are identified in the "Interim Management Policy and Guidelines for Lands Under Wilderness Review" (IMP), dated November 10, 1987, and issued Bureau-wide as Handbook H-8550-1. These IMP guidelines further define the scope of responsibilities and requirements to assure that the FLPMA mandates identified above are carried out in a responsible and consistent manner.

IMP guidelines identified in Chapter II, F and G, establish policy for monitoring, surveillance, and enforcement in WSA's, intended to carry out the responsibilities of the FLPMA mandated wilderness inventory. The monitoring and surveillance guidance directs the Bureau to "prevent, detect, and mitigate unauthorized activities and to properly supervise authorized activities." They further indicate that "More frequent monitoring may be necessary in some WSA's, depending on the number of project applications, ongoing activities, and potential for use conflicts adjacent to or within the WSA." The policy established for enforcement indicates that "BLM will take all actions necessary to ensure full compliance with the Interim Manag ment Policy...Violations will not be tolerated".

Mr. Pene conducted potentially impairing surface disturbance activities within the WSA in 1992 without authorization, after he had been instructed in a letter from our office, dated August 13, 1991, that his proposed work would require further information prior to authorization, relative to the guidelines found in the 3802 regulations . Our office subsequently issued him a Notice of Noncompliance and trespass for that action, for failure to comply with the 3802 regulations. Mr. Pene has appealed that action. Further information regarding this incident is presented in a later section.

The intent of the 3802 regulations and the IMP policy is to carry out the FLPMA mandate that WSA's remain unimpaired pending final resolution by Congress. Our actions to date regarding Mr. Pene's activities on his mining claims within the Westwater Canyon WSA have been intended to carry out these responsibilities. We again express our concern that he feels this is harassment, but reiterate that our actions have not constituted such.

Road Closure

Your inquiry next brings up an issue identified by Mr. Pene as road closure, preventing him from access to his claims. One of the decisions of the Grand Resource Area Resource Management Plan (RMP), approved on June 24, 1985, was to designate 24,454 acres within the Resource Area as closed to use by Outdoor Recreational Vehicles (ORV's), except on existing developed roads within these areas (RMP, p.22). Westwater Canyon was one of the areas receiving such a closure, in an effort to protect scenic and recreational resources. One of the subsequent effects of such a closure is that any proposed mining activity utilizing vehicular access must be authorized through approval of a Plan of Operations.

Mr. Pene correctly points out that he was informed by a previous Acting Area Manager, in a letter dated May 6, 1986, that a Plan of Operations would not be required for the assessment work that Mr. Pene had proposed for that year. This was a mistake on the part of the Bureau. Nonetheless, the fact that this oversight occurred does not mean that the Bureau must continue to ignore the situation once it has been discovered. The 1985 RMP clearly designates the area as closed to ORV use, and the 43 CFR 3802 regulations clearly require a Plan of Operation's for surface disturbing mining operations in WSA's.

However, the fact that the area is closed to ORV use does not preclude Mr. Pene from conducting work on his claims in the area. Regulations governing administration of designated ORV areas, found at 43 CFR 8340.0-5(h), states that such activity can occur if subject to appropriate authorization. In this case, the appropriate authorization would be through approval of a 3802 Mining Plan of Operation. This would give Mr. Pene the authorization he needs to utilize vehicle access into this area, and would allow the Bureau the opportunity to review his proposed use and provide appropriate mitigation to meet our WSA mandates.

Ordered Off Land

Your inquiry refers to an allegation by Mr. Pene that he was "ordered" off the land by a BLM River Ranger. On September 3, 1994, Mr. Pene was encountered on the land by our Westwater River Ranger during a routine river patrol. The Ranger asked Mr. Pene if he had come in by vehicle. Mr. Pene informed him that he had. The Ranger then asked Mr. Pene to leave as he had no authorization to have the vehicle in the closed area. Mr. Pene refused to leave and that ended the encounter. The Ranger was following instructions from management. Mr. Pene allegedly filed some form of complaint over this issue with unknown officials, and the situation may be under some type of investigation. We have no further information, nor have we received any inquiries regarding this alleged complaint.

Mining Claim Validity

Your inquiry indicates that Mr. Pene "...states that the BLM recognized his claims as valid in 1986...". We are unsure of what Mr. Pene means by this statement. The Bureau recognizes that Mr. Pene has legally located mining claims from an administrative standpoint. However, the "validity" of a mining claim is another matter altogether. For a claim to be considered "valid", it must contain a discovery of valuable minerals as outlined in the Mining Law of 1872. Such a determination requires a formal validity examination by a certified mineral examiner. No such study has been conducted to date on any of Mr. Pene's claims, therefore there is no basis upon which to assume that Mr. Pene's claims are "valid" within the context of discovery as identified in the Mining Law of 1872.

It may be that Mr. Pene utilizes the terminology of validity, interchangeably with the concept of valid existing rights in WSA's, which we will address in a subsequent section of this response. However, there is no formal recognition of the "validity" of Mr. Pene's claims in the record, in reference to a formal determination under the Mining Law.

Economic Value of Claims

Mr. Pene has apparently provided your office with assay results from the property which appear to give significant economic value to his claims. The geology of the Westwater Canyon area has been studied extensively over the years because it is one of only a few locations in southeastern Utah with exposures of Precambrian age rock. There are no records from these studies which would indicate the presence of such anomalously high values for metals.

Additionally. as part of the WSA inventory process, FLPMA mandated that every area identified as a WSA be subject to a thorough minerals evaluation by the U. S. Bureau of Mines and the U. S. Geological Survey. The Westwater Canyon study was done by the Bureau of Mines in 1986, in cooperation with the Geological Survey. The study collected and conducted analyses on hundreds of samples collected from within the Westwater Canyon WSA, taken from both the placer deposits and from silicified rocks in the fractures found in the Precambrian rock.

The study identified the presence of approximately 24 troy ounces of gold, contained in a placer deposit roughly 5,000 cubic yards in volume in the Pussycat claim area. The study indicated this deposit was sub-economic due to the small particle size of the gold present and the small areal extent of placer host gravels. The study also identified minor concentrations of metals in fractures and dikes within the Precambrian rocks, but suggests there is no large concentration present due to the limited extent of the silicified fractures.

To summarize, there is no available data to support Mr. Pene's claim of mineral values in the area. Mr. Pene has indicated to us that these values occur in the bedrock on the claims, and that he has developed a new metallurgical method that will allow commercial recovery of these metals. We are aware that changes in metallurgical procedures and metal recovery methods can render sub-economic deposits economic, however, we are not aware of any new metallurgical processes that would accomplish this for this area, other than Mr. Pene's claim that he has devised such a method. Mr. Pene declined to provide us specific details on the mechanics of this process due to it's "proprietary" nature.

Current IBLA Case

Your inquiry refers to Mr. Pene's "case" currently under consideration by the Interior Board of Land Appeals (IBLA). There is a non-compliance and trespass case in front of IBLA involving actions taken by Mr. Pene on the Pussycat claims in 1992 (IBLA 93-229). Mr. Pene submitted a Mining Notice to our office on June 26, 1991, for work on these claims. In a letter from our office dated August 13, 1991, Mr. Pene was informed that we would need additional information on his proposed activity before we could take action to authorize use. We received no response from Mr. Pene to that request. During a routine river patrol on August 18, 1992, our River Rangers found that significant work had occurred on the claims without our knowledge. Mr. Pene was issued a trespass notice by letter dated October 10, 1992, and required to submit a Plan of Operations detailing how he was going to rehabilitate the area disturbed by his unauthorized actions. Mr. Pene subsequently appealed this order and trespass action to IBLA.

To date, IBLA has not ruled on the case and we therefore cannot comment on the particular merits of the case at this time. However, Mr. Pene is apparently under the impression that the Bureau is now trying to force him to comply with the October 10, 1992, order that he appealed, requesting him to submit a Plan of Operations for reclamation of the work he conducted 1992. His confusion likely stems from misreading a letter from our office, dated July 14, 1994, in which we ask him to submit a Plan of Operation for "...any <u>further</u> activity involving the use of a motorized vehicle or other activities prescribed under 43 CFR 3802.1-1" (emphasis added). This was a letter sent from our office after a July 11, 1994, meeting with Mr. Pene, at which meeting we understood Mr. Pene to agree to such a process.

Prior Existing Rights

The final issue identified in your inquiry regards Mr. Pene's assertion that, since his claims were staked in 1984, prior to the inventory decision on the Westwater Canyon WSA (1985), he has some form of prior existing right. We have explained to Mr. Pene on several occasions that the cutoff date for determining what are legally referred to as "valid existing rights" and/or "grandfathered rights" for mining claims in WSA's, is October 21, 1976, the date of the enactment of FLPMA.

The enactment of FLPMA officially initiated the public lands wilderness review program, and Congress specifically directed the Bureau, in the Act, to manage such lands to prevent impairment of wilderness suitability until such time as Congress determined their final eligibility for inclusion into the National Wilderness Preservation system. This issue has been decided in a multitude of IBLA decisions dealing with assertions of valid existing rights and grandfathered uses. Mr. Pene's claims have no valid pre-existing rights or grandfathered uses since they were located after the enactment of FLPMA.

In summary, we have tried every avenue we have to get Mr. Pene to cooperate within the extent of the laws and regulations governing administration of public lands as relates to surface disturbing activities on mining claims in Wilderness Study Areas. Mr. Pene believes that since the Mining Law of 1872 predates the 1976 FLPMA Act, that FLPMA cannot interfere with operations under the Mining Law. He also seems to operate under the assumption that the location of a mining claim transfers some possessory right of ownership to the surface of such lands. A mining claim transfers possessory rights only to the minerals claimed, and only gives a claimant the benefit of using as much of the surface as is necessary to recover those mineral resources.

We once again extend an open invitation to Mr. Pene to work with us, within the proper context of law and regulations, when conducting activity on his mining claims. If indeed he has a valuable mineral deposit and a new method of recovery, then it is in everyone's best interest to allow a full and open assessment of that potential, in a manner that will not impair the wilderness suitability of the Westwater Canyon WSA prior to final action and disposition by Congress.

We hope that the above information has adequately addressed the issues raised in your inquiry. We apologize for the length of this response, but feel the issues raised are complex and deserving of full discussion in order to put the entire situation in proper perspective and context. If we can be of further assistance, or provide any additional information, please contact myself or Lynn Jackson at (801) 259-8193.

Sincerely,

Area Manager

cc:

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